UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NEW HAMPSHIRE INSURANCE COMPANY,	)	
Plaintiff	)	
v.	)	*Civil No. 89-0062 P*
OAKHURST DAIRY, et al.,	)	
Defendants	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this diversity action for declaratory relief the plaintiff insurer, New Hampshire Insurance Company (``New Hampshire''), seeks a declaration that it has no duty to defend defendants Oakhurst Dairy (``Oakhurst'') and Stanley T. Bennett II (``Bennett'') in an action brought against them in the Maine Superior Court by defendant Fitzpatrick Dairy, Inc. (``Fitzpatrick'').[1]

[1] Subsequent to answering the complaint in this action, Fitzpatrick filed for protection under the federal bankruptcy laws. On July 26, 1989 the Bankruptcy Court filed an order relieving New Hampshire from the automatic stay and allowing it to proceed with this declaratory judgment action. All references hereafter made to the defendants in the action before the court are to Oakhurst and Bennett only.

Oakhurst is the named insured of a property owner's insurance policy issued by New Hampshire. Bennett appears to be the president of Oakhurst.[2] In the underlying action against these defendants, Fitzpatrick asserts claims for breach of contract (Count I), conversion (Count II), monopolization of the dairy trade in violation of Maine law (Count III), restraint of trade in violation of Maine law (Count IV), interference with contract (Count V), misappropriation of Fitzpatrick's name, design and packaging (Count VI), personal liability of Bennett based on the foregoing (Count VIII), and punitive damages (Count IX).[3]

[2] *See* Service Contract dated February 29, 1988 between Oakhurst and Fitzpatrick inadvertently omitted from the court's copy of the complaint in the underlying action. Letter to Clerk dated June 16, 1989 (Docket Item #11).

[3] The underlying complaint does not contain a ``Count VII."

The policy issued to Oakhurst provides coverage under two headings: Comprehensive General Liability and Broad Form Comprehensive Liability Extension (``Broad Form Extension"). The plaintiff argues that neither of those policy parts provides coverage for any of the actions alleged in the underlying complaint. The plaintiff also contends that Bennett is not covered by the policy. The defendants assert in opposition to the plaintiff's summary judgment motion that New Hampshire has a duty to defend pursuant to the section in the Broad Form Extension part of the policy providing coverage for advertising injuries and that this duty extends to Bennett under sections of the policy providing coverage for officers or employees acting within the scope of their employment.[4] The defendants assert in support of their cross-motion for summary judgment that any issues concerning coverage involve policy provision ambiguities which should be resolved in their favor.[5]

The policy's Broad Form Extension provision covering advertising injuries states in relevant part:

> The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of **personal injury** or **advertising injury** to which this insurance applies, sustained by any person or organization and arising out of the conduct of the **named insured's** business, within the **policy territory**, and the company shall have the right and duty to defend any suit against the

[4] The defendants also assert an entitlement to a defense based on policy coverage for personal injuries. This claim is discussed in n.8, *infra*.

[5] In their answer the defendants assert the doctrines of waiver and estoppel as affirmative defenses. In a somewhat curious fashion they have alluded to these defenses in the recitation of facts contained in their memorandum in opposition to the plaintiff's motion by noting that an adjustment company, apparently acting as agent for the plaintiff, sent Oakhurst a certain coverage letter dated July 7, 1988 which is attached to the plaintiff's own memorandum. That letter is not properly before the court as it is not included in either statement of material facts filed by the parties, *see* Local Rule 19(b), and because it has not been authenticated by affidavit, *see* Fed. R. Civ. P. 56(e); *C. Wright, A.* Miller & M. Kane, *Federal Practice and Procedure* ' 2722 at pp. 58-60. Moreover, the defendants have failed to support their affirmative defenses with any legal argument. I treat these defenses as having been abandoned for purposes of the cross-motions for summary judgment presently before the court. *See* Local Rule 19(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

> **insured** seeking damages on account of such injury, even if any of the allegations of the suit are groundless, false or fraudulent . . . .

Broad Form Extension II(A) (emphasis in original). ``Advertising injury" is defined as:

> injury arising out of an offense committed during the policy period occurring in the course of the **named insured's** advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

Broad Form Extension II(D) (emphasis in original). The policy does not define the term ``advertising activities." The plaintiff argues that the underlying complaint makes no allegations falling within the scope of the policy's definition of the term ``advertising injury."

The Law Court has established the following guidelines for determining the scope of an insurer's duty to defend:

> In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. Moreover, where there in an ambiguity in the language of the policy, the doubt should be resolved in favor of finding that the insurer has a duty to defend the insured.

Peerless Insurance Co. v. Brennon, No. 5187, slip op. at p. 3 (Me. Sept. 6, 1989), quoting *Union Mutual Fire Insurance Co. v. Topsham*, 441 A.2d 1012, 1015 (Me. 1982). In determining whether there is a duty to defend, the court must compare ``the provisions of the insurance contract with the underlying complaint. If there is *any* legal or factual basis that could be developed at trial, which would

obligate the insurer to pay under the policy, the insured is entitled to a defense." *J.A.J., Inc. v. Aetna Casualty and Surety Co.*, 529 A.2d 806, 808 (Me. 1987) (emphasis in original). *See also Burns v. Middlesex Insurance Co.*, 558 A.2d 701, 702 (Me. 1989). The pleading test is based ``exclusively on the facts as *alleged* rather than on the facts as they actually are." *American Policyholders' Insurance Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 249 (Me. 1977) (emphasis in original).

The complaint in the underlying action need not allege specific facts which are unequivocally within the insurance coverage. *Travelers Indemnity Co. v. Dingwell*, 414 A.2d 220, 226 (Me. 1980). The Law Court has explained the rationale of the rule requiring a liberal construction of the underlying complaint as follows:

> A defendant has no power to amend a complaint which contains an incomplete statement of facts. Whether he can obtain a defense from his insurer must depend not on the caprice of the plaintiff's draftsmanship, nor the limits of his knowledge, but on a *potential* shown in the complaint that the facts ultimately proved may come within the coverage. Even a complaint which is legally insufficient to withstand a motion to dismiss gives rise to a duty to defend if it shows an intent to state a claim within the insurance coverage.

Id. (emphasis in original). The Court recently reiterated that:

> a duty to defend may arise from a ``broad, conclusory allegation, such as negligence which does not include specific factual allegations." That the allegations need not include specific facts that are unequivocally within the coverage accords with the requirement of M.R.Civ.P. 8(a) -- that a plaintiff's complaint include ``a short and plain statement of the claim showing that the pleader is entitled to relief."

Lavoie v. Dorchester Mutual Fire Insurance Co., 560 A.2d 570, 571 (Me. 1989), quoting *Travelers Indemnity Co. v. Dingwell*, 414 A.2d at 225-26 (citations omitted).

In order for there to be an ``advertising injury," as defined in the policy, there must be an offense which occurred in the course of the insured's advertising activities. Although there is no mention in the complaint of the word ``advertising" or any of its derivatives, the complaint must

nevertheless be examined to determine whether it evidences an intent to encompass activities which might be classified as ``advertising activities."

As previously noted, the term ``advertising activities" is not defined in the policy. However, an examination of certain court decisions is instructive. In *Playboy Enterprises, Inc. v. St. Paul Fire & Marine Insurance Co.*, 769 F.2d 425 (7th Cir. 1985), the court was called upon to construe an exception to a defamation coverage provision in a general liability policy. Excluded from coverage were publications or utterances in the course of or related to advertising activities conducted by or on behalf of the insured. The court adopted the interpretation of the term ``advertising" formulated in *Fox Chemical Co. v. Great American Insurance Co.*, 264 N.W.2d 385 (Minn. 1978), as referring to the ``widespread distribution of promotional material to the public at large," *Playboy*, 769 F.2d at 428-29, and held that the dissemination of an allegedly defamatory letter by one of Playboy's regional advertising managers to eleven advertisers did not constitute the widespread distribution required by the exclusion. *Id.* at 429. *See also Fox Chemical* (distribution to master distributors of 74 of 400 pamphlets printed as informational aid for use in educating salespersons about new product did not constitute a public distribution within scope of policy's exclusionary clause).

In *John Deere Insurance Co. v. Shamrock Industries, Inc.*, 696 F.Supp. 434 (D.Minn. 1988), the court construed a policy coverage provision identical to the one at issue here. The complaint in the underlying action charged the defendants with patent infringement, misappropriation of trade secrets, unfair competition and breach of contract. The defendants argued that the insurer had a duty to defend under the policy's coverage for advertising injury based on allegations in the complaint that they ``disclosed, disseminated and/or published through direct communication and/or through the sale and distribution of machines, trade secrets and proprietary information of [the plaintiff] . . . ." *Id.* at 436. The communications involved three letters sent by one of the defendants to a potential buyer

``exclaiming the strengths and virtues" of the product which was the subject of the patent infringement claim. *Id.* at 439-40. The insurer argued that since the letters were sent to only one buyer they did not constitute advertising activity as defined in *Fox Chemical*. The court distinguished *Fox Chemical* and *Playboy*, noting that the Minnesota court's interpretation in *Fox* was based in part on ``comparison words found in the exclusion . . . [to wit] `broadcasting' and 'telecasting' . . . which tend to indicate more widespread distribution" and that ``[t]here are no such words in the instant policies." *Id.* at 439. Instead, it focused on the definition of ``advertise" found in *Black's Law Dictionary*: ``Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business . . . ." *Black's Law Dictionary*, 50 (5th ed. 1979). Acknowledging that ``[w]hile activity directed at one customer seems to stretch the meaning of advertising," the court concluded that *Black's Law Dictionary*'s definition of ``advertise" ``encompasses any form of solicitation, presumably including solicitation of one person." *John Deere*, 696 F. Supp. at 440. Finding that there is more than one reasonable interpretation of the meaning of ``advertising activity" and that, therefore, the policy is ambiguous, the court held that the policy must be construed against the insurer.[6]

[6] All three courts have in actuality consistently applied a universally accepted principle of law: that ambiguous insurance policy provisions are to be construed most narrowly against the insurer and in favor of the insured. In *Fox* and *Playboy* the courts were required to interpret the scope of language *excluding* advertising activities. In *John Deere*, the court was called upon to interpret the scope of *inclusionary* coverage language. The absence in all of the policies of any definition of ``advertising activity" rendered them ambiguous and compelled an interpretation favoring the insured.

By comparison, the Fitzpatrick complaint in the action underlying the present case contains no allegations relating to any form of solicitation. The defendants nevertheless claim that a number of the actions alleged in the complaint *could* have been made in the course of Oakhurst's advertising activities. They note that Count I alleges acts ``not described with particularity" which ``could very well have been the result of the insured's `advertising activities.'" Defendants Oakhurst Dairy and Stanley T. Bennett II's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment (``Defendants' Memorandum") p. 5. The defendants rely on paragraph 4 to support the contention that Count I does not allege particular acts.[7] However, paragraph 4 can only be read in the context of the other paragraphs contained in Count I as introducing a sequence of events which constituted the alleged breach of contract. None of these described events suggests even a remote connection to advertising activities. The defendants further argue that the alleged injuries are the same as some of those contained within the policy's definition of ``advertising injury." However, this argument ignores the definition's threshold requirement that the offensive act occur ``in the course of the named insured's advertising activity" before the injury may even be considered.

The Defendants next observe that Counts III and IV of the underlying complaint, which allege respectively monopolization of the dairy industry and restraint of trade, do not state whether advertising activities caused or contributed to the cause of the injury to the Fitzpatrick business. They argue that ``the potential for that set of facts to be proved at trial exists. Further, these actions

[7] Paragraph 4 follows an allegation that the plaintiff had refused all of Oakhurst's offers to buy the plaintiff's dairy business and states: ``Thereafter the defendant engaged in a course of conduct intended to and resulting in the destruction and takeover of the defendant's business." Fitzpatrick Complaint & 4.

certainly fit within the coverage for `unfair competition.'" Defendants' Memorandum pp. 5-6. This argument again misconstrues the pleading test requiring that the complaint at least ``show[ ] an intent to state a claim within the insurance coverage." *Travelers Indemnity Co. v. Dingwell*, 414 A.2d at 226. Here, there is no indication of an intent to state that any of the alleged actions (even if they state a claim for unfair competition) took place in the course of Oakhurst's advertising activities.

The defendants next assert that Count V, alleging interference with contract, shows an intent to state a claim within the ``advertising injury" coverage of the policy. Paragraph 22 of the Fitzpatrick complaint alleges that Oakhurst intentionally interfered with the performance of the Fitzpatrick/Oakhurst contracts by preventing Fitzpatrick from performing them and by causing Fitzpatrick's performance to be more expensive or burdensome. This paragraph cannot be construed to state an intent to show that the alleged interference of contract took place within the course of Oakhurst's advertising activities.[8]

[8] The defendants also assert that in this count it is possible Fitzpatrick is alleging that Oakhurst disparaged its business reputation as part of the claimed interference and that that type of injury is also included in the definition of ``personal injury." No reasonable reading of the complaint as a whole allows for this suggested interpretation of Count V as signaling an intent to state a disparagement claim. Accordingly, the complaint does not evidence an intent to state a claim within the ``personal injury" coverage of the policy.

The defendants also argue that paragraph 25 of Count VI alleges actions that could have occurred in the course of Fitzpatrick's advertising injuries.[9] Paragraph 25 essentially states a cause of action for misappropriation of Fitzpatrick's name, design and packaging. Like the other paragraphs on which the defendants rely, this paragraph does not evidence any intent to state that Oakhurst engaged in any advertising in connection with the alleged misappropriation of Fitzpatrick's name. Unlike the activity alleged in *John Deere*, the actions alleged in the Fitzpatrick complaint cannot be described as involving any type of advertising activity.[10]

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[9] Paragraph 25 states:

> Since April 26, 1988 when plaintiff was forced out of business by the defendant to the date of this complaint, the defendants [sic] have continued to appropriate and use for its own commercial benefit the name, design and packaging of the plaintiff dairy, all without the consent or permission of the plaintiff.

[10] This conclusion is buttressed by an examination of the two contracts entered into by Fitzpatrick and Oakhurst, one providing that Oakhurst would package dairy products for Fitzpatrick and the other providing that Fitzpatrick would distribute and service Oakhurst's products in Fitzpatrick's service area. In essence, Fitzpatrick alleges that these contracts became the principal, if not the exclusive, vehicle used by Oakhurst to commit the alleged acts which formed the basis for its complaint. Neither contract makes any reference to any type of advertising activity.

In sum, the provision of the policy extending coverage to advertising injuries is ambiguous because nowhere in the policy is the critical term ``advertising activities" defined. This ambiguity must be resolved against the plaintiff and in favor of the defendants. Thus, I interpret the term ``advertising activities" most liberally in favor of the defendants, as did the court in *John Deere*, as encompassing any form of solicitation. Moreover, I have liberally construed the allegations of the underlying complaint and resolved any doubt in favor of the defendants. I conclude, however, that the underlying complaint cannot be read as alleging any potential basis for liability within the scope of coverage afforded by the policy. *See L. Ray Packing Co. v. Commercial Union Insurance Co.*, 469 A.2d 832 (Me. 1983); *Horace Mann Insurance Co. v. Maine Teachers Ass'n*, 449 A.2d 358 (Me. 1982). Accordingly, I recommend that the plaintiff's motion for summary judgment be ***GRANTED*** and that the defendants' cross-motion for summary judgment be ***DENIED***.[11]

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 18th day of October, 1989.

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David M. Cohen
United States Magistrate

[11] Because I conclude that there is no coverage under the policy, I do not reach either the issue of whether defendant Bennett is an insured for duty-to-defend purposes or the issue of whether certain exclusions are ambiguous.